

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Reexamination of the Comparative Standards	)	MM Docket No. 95-31
for	)	
Noncommercial Educational Applicants	)	
	)	
Association of America's Public Television	)	
Stations' Motion for Stay of Low Power	)	
Television Auction (No. 81)	)	

**COMMENTS OF THE ASSOCIATION OF PUBLIC TELEVISION STATIONS**

The Association of Public Television Stations ("APTS") hereby submits its comments in the above captioned proceeding.<sup>1</sup> APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation's 356 noncommercial educational television stations. APTS members are also the licensees of approximately 700 TV translator stations that rebroadcast noncommercial educational television stations and provide valuable public television service to rural communities. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch, and engages in planning and research activities on behalf of its members.

**POSITION SUMMARY**

APTS submits that applicants demonstrating eligibility for noncommercial educational ("NCE") TV stations (and the translators that rebroadcast such stations) are exempt from competitive bidding. APTS believes that use of the relaxed channel reservation system

---

<sup>1</sup> Reexamination of the Comparative Standards for Noncommercial Educational Applicants; Association of America's Public Television Stations' Motion for Stay of Low Power Television Auction (No. 81), Second Further

suggested by the FCC for allotted TV/DTV channels is adequate to preserve public television's access to TV/DTV spectrum going forward.

For TV translator stations, however, APTS submits that the current licensing scheme, which does not account for noncommercial ("NCE") TV translators, is unworkable and must be reformed in order to be consistent with statute, congressional intent and good public policy. In order to preserve existing noncommercial television service (i.e., continued service to areas that presently receive public television service), APTS suggests that NCE TV translators be given additional first-come, first-serve application processing opportunities on a rolling basis. Such applications would include NCE TV translators that would "fill in" gaps in public television analog or DTV coverage (or gaps due to the transition from analog to DTV service).

For NCE translators that seek to extend public television service to currently unserved or underserved areas, APTS suggests that the Commission use a need-based system. If the NCE TV translator application were mutually exclusive with other applications, the Commission would require the translator applicant to make a showing as to why the translator frequency should be awarded for noncommercial use.

## **I. Introduction**

The Communications Act of 1934, as amended, provides that the competitive bidding authority does not apply to "licenses or construction permits issued by the Commission... for stations described in section 397(6) of this Act," *i.e.*, NCE stations.<sup>2</sup> When implementing the

---

Notice of Proposed Rulemaking, FCC 02-44, MM Docket No. 95-31 (rel. February 25, 2002) (hereinafter "NPRM").

<sup>2</sup> 47 U.S.C. § 309(j)(2)(C). Section 397(6) states that "The terms "noncommercial educational broadcast station" and "public broadcast station" mean a television or radio broadcast station which-- (A) under the rules and regulations of the Commission in effect on the effective date of this paragraph [Nov. 2, 1978], is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes." 47 U.S.C. § 397(6).

competitive bidding mandated by Congress, the Commission chose to award licenses for reserved spectrum among competing NCE applicants according to a point system designed to select the most preferred applicant,<sup>3</sup> but required applicants proposing to use unreserved spectrum to compete at auction with their commercial counterparts.<sup>4</sup> In NPR v. FCC, the U.S. Court of Appeals for the D.C. Circuit rejected the Commission's construction of Section 309,<sup>5</sup> holding that "nothing in the [Communications] Act authorizes the Commission to hold auctions for licenses issued to NCEs to operate in the unreserved spectrum," because Section 309(j)(2)(C) denies the Commission the authority to use competitive bidding "based on the nature of the station that ultimately receives the license, and not on the part of the spectrum in which the station operates."<sup>6</sup>

On remand from the court, the Commission seeks additional comment on the mechanisms it should use to resolve the competing interests of commercial and NCE entities for non-reserved spectrum. It has proposed three specific options:

- (1) holding NCE entities ineligible for licenses for non-reserved channels and frequencies;
- (2) permitting NCE entities opportunities to acquire licenses for non-reserved channels and frequencies when there is no conflict with commercial entities; and
- (3) providing NCE entities opportunities to reserve additional channels in the Table of Allotments.<sup>7</sup>

---

<sup>3</sup> See 47 C.F.R §§ 73.7000 et. seq., Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report & Order, FCC 00-120, 15 FCC Rcd 7386 (rel. April 21, 2000), and Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Memorandum Opinion and Order, FCC 01-64, 2001 FCC LEXIS 1191, MM Docket No. 95-31 (rel. Feb. 28, 2001).

<sup>4</sup> Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report & Order, FCC 00-120, 15 FCC Rcd 7386, ¶ 106 et. seq. (rel. April 21, 2000).

<sup>5</sup> 254 F.3d 226 (D.C. Cir. 2001).

<sup>6</sup> *Id.* at 229.

<sup>7</sup> NPRM, ¶ 8.

The Commission also sought comment on the status and licensing of NCE television translators, since there has never been any reserved spectrum for translator stations.<sup>8</sup>

## **II. The Scope of the Legislative Exemption Includes All NCE Entities That Meet the TV Eligibility Requirements Under FCC Rules**

### **A. Scope of the Exemption**

The Commission seeks comment on the scope of the legislative exemption from auctions set forth at Section 309(j)(2)(C).<sup>9</sup> Section 309(j)(2)(C) states that the Commission's competitive bidding authority does not apply to "licenses or construction permits issued by the Commission. . . for stations described in Section 397(6) of this Act."<sup>10</sup> Section 397(6) of the Communications Act defines the terms "noncommercial educational broadcast station" and "public broadcast station" as a radio or television broadcast station that:

“(A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or

(B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.”<sup>11</sup>

Section 397(6) became effective on November 2, 1978. Both at that time and currently, the Commission's rules stated that for the television service, NCE stations:

“will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television service.”<sup>12</sup>

---

<sup>8</sup> NPRM, ¶ 20, et. seq.

<sup>9</sup> NPRM, ¶ 9.

<sup>10</sup> 47 U.S.C. § 309(j)(2)(C).

<sup>11</sup> 47 U.S.C. § 397(6).

<sup>12</sup> 47 C.F.R. § 73.621(a).

Reading these eligibility requirements in tandem with the statutory exemption, the Commission requested comment on which applicants are exempt from competitive bidding and under what circumstances. Specifically, it asks whether all “nonprofit educational organizations” are exempt from auctions whenever they apply for any broadcast license, or only when they make a “showing that the station will be used for the advancement of an educational program.”<sup>13</sup>

APTS submits that the proper reading of the scope of the exemption is that it applies only when the NCE entity has fulfilled the licensing requirement under Section 73.621(a) of the Commission's rules and has made the required showing that the proposed station “will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television service.” 47 C.F.R. Section 73.621(a). See, e.g., Way of the Cross of Utah, Inc., 101 FCC 2d 1368, 1374, 58 RR 2d 455 (1985). The Commission has ample precedent regarding the eligibility criteria of noncommercial educational TV stations.<sup>14</sup>

APTS emphasizes that the scope of the auction exemption is quite narrow, consistent with the Commission’s past rulings on noncommercial educational broadcast station eligibility. For example, the for-profit subsidiary of a non-profit organization would not be eligible for the exemption. Similarly, a non-profit educational entity that made no showing as to its NCE eligibility or that proposed a commercial operation would likewise not be eligible for the

---

<sup>13</sup> NPRM, ¶ 9.

<sup>14</sup> Way of the Cross of Utah, Inc., 58 RR 2d 455, 101 FCC 2d 1368, 1374 (1985); Palm Bay Public Radio, Inc., 6 FCC Rcd 1772 (1991); Community Educational Association, 10 FCC Rcd 3179 (ALJ 1995); Henry Golderg, Esq. (WDCU(FM)), 9 C.R. 955, 956 (MMB 1997).

exemption.<sup>15</sup> Such non-profit entities could be required to participate in an auction for non-reserved spectrum. But a non-profit entity applying to operate an NCE station eligible under FCC rules could not be subjected to the Commission’s auction procedures consistent with Section 309(j)(2).

This reading of the statute is consistent with the plain language of Section 309(j)(2) and Sections 397(6) as well as Section 73.621 and 73.503 of the Commission rules as applied through decades of Commission decisions and policy regarding the eligibility criteria for noncommercial educational broadcast stations.<sup>16</sup> Moreover, this reading is consistent with the Court’s holding in NPR v. FCC that Section 309(j)(2)(C) denies the Commission the authority to use competitive bidding “based on the nature of the station that ultimately receives the license, and not on the part of the spectrum in which the station operates.”<sup>17</sup> In other words, what is determinative is the particular use of a proposed broadcast station (i.e., noncommercial educational use, as defined by statute and FCC rules, regulations and policies), rather than the particular spectrum in which the station is licensed. If a non-profit entity seeks to use unreserved spectrum to operate an NCE station, as defined by Section 397(6) of the Act and the Commission's rules, the “nature of the station that ultimately receives the license” would control, barring the use of auctions to award spectrum to this station.

## **B. The Public Safety Exemption**

The FCC has asked how the Section 309(j)(2)(C) exemption (for noncommercial educational stations) is consistent with the public safety exemption in Section 309(j)(2)(A) of the

---

<sup>15</sup> Indeed, a nonprofit educational entity that could qualify as an NCE station could participate at auction if it chose not to make the eligibility showing.

<sup>16</sup> See cases cited in Footnote 14, supra.

<sup>17</sup> 254 F.3d 226, 229.

Act. A non-profit organization, as set forth in the Section 309(j)(2)(A) public safety exemption, is not equivalent to a noncommercial educational broadcast station, as set forth in the Section 309(j)(2)(C) exemption. See, e.g. Way of the Cross of Utah, Inc., 101 FCC 2d 1368, 58 RR 2d 455 (1985) (finding a nonprofit organization nonetheless ineligible to hold NCE licenses.)

The exemption for noncommercial educational stations explicitly incorporates the statutory definition of “noncommercial educational broadcast station” and “public broadcast station” in Section 397(6) of the Act, and by inference, the applicable rules and regulations of the Commission. The public safety exemption provision does not refer to any other statutory definition and therefore, must be interpreted in light of the language of Sec. 309(j)(2)(A) and the Commission’s historical treatment of public safety radio service.<sup>18</sup>

### **III. Barring or Restricting NCE Entities from Applying for Unreserved Channels Is Contrary to Congressional Intent and Represents an Unwarranted Departure from Decades of Commission Policy**

Among the Commission’s proposals for resolving competing applications between commercial and public broadcasting applicants for non-reserved spectrum are to: (1) hold NCE entities ineligible for licenses for non-reserved channels and frequencies<sup>19</sup> or (2) permit NCE entities opportunities to acquire licenses for non-reserved channels and frequencies only when there is no conflict with commercial entities.<sup>20</sup> While these options may seem like an expedient solution to a thorny statutory construction issue, both options are absolutely contrary to expressed congressional intent and established Commission policy. Congress and the Commission have always encouraged and supported the development and extension of the

---

<sup>18</sup> Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Memorandum Opinion and Order, WT Docket No. 99-87, FCC 02-82 ¶ 27 (rel. April 18, 2002).

<sup>19</sup> NPRM, ¶ 11

<sup>20</sup> NPRM, ¶ 12 et. seq.

service of public broadcast stations, whether that broadcast service is provided over reserved spectrum or unreserved spectrum.

APTS is not unsympathetic to the Commission's challenges in instituting competitive bidding procedures for broadcast spectrum while still preserving noncommercial educational access to such spectrum, but whether those challenges are difficult or not, the Commission is statutorily bound to fulfill congressional mandates and act in the public interest with regard to noncommercial educational access to unreserved spectrum.

Congress has determined that "[I]t is necessary and appropriate for the Federal Government to complement, assist, and support a national policy that will most effectively make public telecommunications service available to all citizens of the United States."<sup>21</sup> Congress has further concluded that "[I]t is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications service through all appropriate available telecommunications distributions technologies."<sup>22</sup>

To accomplish this statutory mission, public broadcast stations have used all available technological means to deliver service to the public, including use of unreserved spectrum where reserved spectrum is not available or where the Commission has chosen not to reserve such spectrum (as in the case of TV translators). Currently, at least thirteen (13) full-power public television stations and approximately 700 NCE television translator stations use unreserved spectrum to provide noncommercial educational service to communities throughout the United States and its territories. It would be inconsistent with the universal service mandate of public broadcasting for the Commission to bar or restrict this access to unreserved spectrum. If

---

<sup>21</sup> 47 U.S.C. § 396(a)(7).

<sup>22</sup> 47 U.S.C. § 396(a)(9).



Congress had wished to make unreserved broadcast spectrum into “commercial” spectrum, it could have done so in the Balanced Budget Act of 1997. It did not. Instead, Congress opted to exempt stations defined in Section 397(6) of the Communications Act from participating in competitive bidding for all spectrum. It would be particularly ironic if the Commission took it upon itself to “rewrite” Section 309(j)(2) and Section 396(7) and implement the exemption by doing away with the very need to apply the exemption to unreserved spectrum or to punish NCE broadcasters for protecting their statutory rights by denying them the right to even apply for the spectrum at issue.

Moreover, both proposals are contrary to established Commission policy. As pointed out earlier, channels not reserved for educational purposes are also not reserved for “commercial uses” but, instead, are available for all qualified applicants. There is ample Commission precedent, going back five decades, for permitting commercial and noncommercial applicants to compete for unreserved channels. See, e.g., Memorandum Opinion and Order in Docket No. 20418, 90 FCC 2d 160, 179-180 (1982); Construction Permit for New Television Broadcast Station in San Angelo, Texas, 18 RR 2d 714, 21 FCC 2d 901 (1970) (resolving competing applications between a noncommercial and a commercial applicant for an unreserved channel); Reservation of Channel 13 in Eureka, California, 7 RR 2d 1593, 3 FCC 2d 614 (1966) (permitting an educational entity to apply for use of unreserved channel against commercial applicants, and pointing out that “numerous ETV stations have commenced operation on unreserved channels”); Channel Assignments in Wilmington-Atlantic City, 18 RR 1653, 1661-62 (1959) (declining to reserve “commercial” television channel for educational use and stating that educational entities could apply for use of unreserved channel on comparative basis with

commercial applicants). Commission policy is clear and well-established: unreserved channels are available for all qualified applicants, commercial or noncommercial.

The expediency of a simple fix to the NCE exception to the competitive bidding process is not a sufficient justification for overturning established Commission precedent welcoming noncommercial educational access to unreserved spectrum.

Further, the Commission's suggestion that NCE applicants obtain unreserved spectrum only if no commercial broadcaster applies for it likewise makes no sense. Under existing broadcast competitive bidding procedures (and those applied to TV translators), a "singleton" applicant, which is an application that is not subject to mutually exclusive applications, is awarded the license without bidding in any event. This approach changes virtually nothing from the current auction procedures, as a "singleton" public broadcast application would be awarded the license without bidding anyway. Additionally, in the extremely rare case where the only applications for unreserved spectrum were filed by NCE applicants that were mutually exclusive with other NCE applicants, the FCC should apply its NCE point system as the appropriate way to determine the best use of the spectrum. The Commission should reject the option of allowing NCE applicants access only to "left over" unreserved spectrum that no commercial operator wants, as that option is very detrimental to the growth and well-being of public broadcasting and certainly contrary to Section 396 of the Communications Act and the public interest.

To ban NCE entities from applying for unreserved spectrum, or otherwise restrict access to that spectrum to a limited category of "unwanted" spectrum, would run contrary to the goals of universal public broadcasting service articulated by the Congress and fly in the face of decades of Commission precedent.

#### **IV. Providing NCE Entities Opportunities to Reserve Additional Channels in the Table of Allotments (Option # 3) is an Adequate Solution for Full-Power Television Stations**

As part of its proceeding establishing comparative criteria for applicants for reserved spectrum, the Commission relaxed the criteria necessary to reserve a new broadcast channel at the allocation stage and determined that an NCE entity could seek to reserve a TV or FM channel in the Table of Allotments for exclusive NCE use if it could demonstrate that a greater need existed for an NCE allocation than for a commercial allocation. The need for an NCE station would be greater than the need for a commercial station if it were demonstrated that:

(A) the NCE radio proponent is technically precluded from using the reserved band by existing stations or previously filed applications or an NCE television proponent shows that there is no reserved channel assigned to the community; and

(B) the NCE proponent would provide a first or second radio or television NCE service to 10% of the population within the proposed allocation's 60 dBu (1 mV/m) service contour (radio) or Grade B contour (TV). New NCE service to fewer than 2,000 people would be considered insignificant for purposes of this determination.<sup>23</sup>

If an NCE entity could not make this showing, the Commission would not reserve the channel, but the NCE entity could still compete with commercial entities for the channel at auction.<sup>24</sup>

The Commission now seeks comment on further relaxation of these criteria and what other options might exist to “ensure that NCE entities have reasonable opportunities to obtain the spectrum they need.”<sup>25</sup> APTS believes that the Commission’s existing reservation policy

---

<sup>23</sup> See 47 C.F.R. § 73.202(a)(1), and Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report & Order, FCC 00-120, 15 FCC Rcd 7386, ¶ 114 (rel. April 21, 2000)

<sup>24</sup> *Id.* at ¶ 115.

<sup>25</sup> NPRM, ¶ 19.

provides adequate opportunities for public television to obtain the full service television spectrum it needs going forward.<sup>26</sup>

## **V. Television Translators**

The Commission acknowledges that its reconsideration of licensing policies for non-reserved spectrum poses unique issues for noncommercial TV translator stations, which do not have access to “reserved” spectrum. APTS has grave concerns about the current licensing policy and submits that the Commission’s licensing procedures for TV translator stations need to be revamped to ensure appropriate access by public broadcasters. APTS’s underlying goals are two-fold: (i) to preserve existing noncommercial educational television service (including service provided by NCE TV translator stations) both during and after the digital television transition, and (ii) to ensure appropriate future opportunities for noncommercial educational stations to obtain TV translator licenses so that noncommercial service can be provided to currently unserved and underserved areas.

APTS submits that, in light of statute, Commission rules and precedent, and good public policy, TV translator stations that rebroadcast noncommercial educational stations should be exempt from auctions and, indeed, entitled to take advantage of more flexible first-come, first-served application processing.

### **A. Background on Noncommercial TV Translator Stations**

TV translator stations are secondary services using low power transmitters to pick up a television signal and retransmit that signal, without significant alteration, to areas that do not

---

<sup>26</sup> Reexamination of the Comparative Standards for Noncommercial Educational Applicants, 15 FCC Rcd 7386, ¶ 114 (2000)

receive adequate primary television service.<sup>27</sup> Distinguished from LPTV stations, which are secondary services that use low power transmitters to originate some amount of programming, TV translators only retransmit the programming of their primary station and do not originate any programming.<sup>28</sup> There is no “reserved” spectrum for TV translator stations because translators are licensed on a “drop in” basis, instead of based on a Table of Allocations (like full service TV). The Commission never reserved certain TV translator channels for noncommercial use (as it did for FM stations and FM translators, which use reserved FM Channels 200-220). Instead, over the years, applicants proposing to use TV translators to retransmit NCE television stations have obtained licenses through Commission licensing processes that applied to all translator stations.

Public television has been remarkably successful in using TV translators to extend public television service to rural or remote areas in a cost-effective manner consistent with the realities of public television funding. By virtue of its full-power TV stations and approximately 700 TV translators, public television provides services to over 99 percent of the American public.<sup>29</sup> Over

---

<sup>27</sup> 47 C.F.R. § 74.731(a) (“Television broadcast translator stations and television broadcast booster stations provide a means whereby the signals of television broadcast stations may be retransmitted to areas in which direct reception of such television broadcast stations is unsatisfactory due to distance or intervening terrain barriers”). See also 47 C.F.R. § 74.701(a) (defining a “television broadcast translator station” as “a station in the broadcast service operated for the purpose of retransmitting the programs and signals of a television broadcast station, without significantly altering any characteristic of the original signal other than its frequency and amplitude, for the purpose of providing television reception to the general public.”)

<sup>28</sup> “The legal status of a translator station is defined by the nature of its programming, following an appropriate declaration by the licensee, as either rebroadcast or origination, not by the station's original application or authorization. An LPTV operating under a TV translator mode of service is one that retransmits a television broadcast station and originates programming in any amount greater than 30 seconds per hour and/or operates a subscription service. A translator only retransmits the programming of its primary station and does not originate programming.” Complaints of Maine Public Broadcasting Corporation against A-R Cable Services d/b/a Cablevision Petitions for Declaratory Ruling and Requests for Carriage, 1 CR 741, 10 FCC Rcd 1893 (1995)

<sup>29</sup> By way of comparison, the FCC has licensed a total of 377 noncommercial educational TV stations as compared with 4,762 TV translators (UHF & VHF) and 2,212 UHF/VHF LPTV stations. See Broadcast Totals as of September 30, 2001 on FCC website at [www.fcc.gov](http://www.fcc.gov). Thus, the approximately 700 NCE TV translators licensed to APTS members comprise only about 10% of all TV translator/LPTV licenses.

the years, many of the TV translators rebroadcasting public television stations were encouraged, and funded, in part, by the Corporation for Public Broadcasting or by the Department of Commerce's Public Telecommunications Facilities Program ("PTFP") and by state or local public or charitable funds, reflecting an important federal, state and local investment in public television service to our nation.

A study conducted by the Corporation for Public Broadcasting in 1998 concluded that over 12 million Americans are served by public television translators.<sup>30</sup> Of these, over two million Americans receive no other public television service. This study establishes that the preservation and expansion of noncommercial TV translator service affects not just a few scattered individuals, but entire communities, with smaller, more rural communities being most affected. Moreover, noncommercial educational access to translators affects not only those viewers who access television signals over the air but numerous subscribers to rural cable systems nationwide that rely on the reception of television translator signals at cable headends to provide service to areas unserved by off-air signals.

#### **B. Noncommercial Educational Translators Are Exempt from Auctions**

The Commission seeks comment on whether the exemption in Section 309(j)(2)(C) applies to TV translators that rebroadcast noncommercial educational stations. In the NPRM, the Commission suggested that because it does not license NCE entities "as such" for TV translator channels, the exemption at Section 309(j)(2)(C) might not apply to the licensing of these

---

<sup>30</sup> See Reply Comments of the Association of America's Public Television Stations, and the Public Broadcasting Service, Rural and Small Market Access to Local Television Broadcast Signals, Department of Commerce, National Telecommunications and Information Administration, Docket No. 000208032-0031-01 (May 15, 2000), citing Jerry Ostertag, Analysis of Impact of Elimination of Translators, Corporation for Public Broadcasting, September 18, 1998.

stations.<sup>31</sup> APTS submits that noncommercial educational TV translators are exempt from competitive bidding by applying the principles of statutory construction, congressional intent, the FCC’s own statements regarding noncommercial TV translators, and good public policy.

Section 309(j)(2)(C) exempts stations described in Section 397(6) from competitive bidding. Section 397(6) defines “noncommercial educational broadcast station” and “public broadcast station,” but is silent as to TV translator stations. This is not surprising. In November, 1978, when Section 397(6) became effective, the Commission was in the midst of a broad-based inquiry into the role of TV translators in the national telecommunications system.<sup>32</sup> The Commission cannot assume that Congress’s failure specifically to exempt translators of noncommercial broadcast stations from auctions is evidence of a congressional intent to define translators as ineligible to be licensed as “noncommercial stations” and thus to force translators of noncommercial stations to auction. The Commission must look beyond the non-explicit language of Section 309(j)(2)(C) and Section 397(6), particularly to language adopted by Congress since 1978, when Section 397(6) became effective.

Section 615(l)(1) of the Act, which defines “qualified noncommercial educational television station” for purposes of cable carriage is instructive. Section 615(l)(1) states that the term “qualified noncommercial educational television station” includes:

(I) the translator of any noncommercial educational television station with five watts or higher power serving the franchise area, (II) a full-service station or translator if such station or translator is licensed to a channel reserved for noncommercial educational use pursuant to section 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto,

---

<sup>31</sup> “Given that the Commission has never licensed LPTV and TV translator facilities to operate as NCE stations, subject to the restrictions that apply to those stations, we seek comment on whether section 309(j)(2)(C) applies to LPTV and TV translator, and if not, whether we must use competitive bidding to resolve competing applications for these services, even if they include applications filed by entities that meet the general NCE eligibility criteria set forth in the rules.” NPRM, ¶ 21.

<sup>32</sup> An Inquiry into the Future Role of Low-Power Television Broadcasting and Television Translators in the National Telecommunications System, 68 FCC 2d 1525 (1978).

and (III) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial educational stations.

(emphasis added).

Section 615(l)(1)(I) treats as a “noncommercial educational television station” all translators of noncommercial educational television stations operating at a minimum power level. Moreover, in order for the language in Section 615(l)(1)(III) to have meaning, the Commission must have the authority to determine that “translators” on unreserved channels are qualified as “noncommercial educational stations.” In addition, Congress clearly intended to accord special must-carry status to noncommercial TV translators. The legislative history of Section 615(l) makes this plain: “Translators are particularly important to rural areas that are located far from the principal communities of the main station. Including translators in this definition ensures carriage by cable systems in remote areas not served by the primary public television licensee.”<sup>33</sup>

Based on this statutory analysis, APTS believes that Congress did not intend to subject noncommercial TV translators to competitive bidding. Congress intended that the Commission treat noncommercial TV translators as “noncommercial educational broadcast stations” under the auspices of Section 397(6) of the Act. The Commission should interpret the competitive bidding exemption in Section 309(j)(2)(3) to include NCE translators, given Congress’s inclusion of translators in the definition of noncommercial educational translator station in the cable carriage context.

The development of the FCC’s TV translator policy also reveals the FCC’s desire to ensure that noncommercial TV translators had appropriate access to spectrum. The FCC’s translator policies were, for many years, developed on an ad hoc basis. In 1980, after commencing a proceeding in 1978 to study the role of television translator and low power

---

<sup>33</sup> S. Report No. 92, 102d Cong., 1st Sess. (June 28, 1992)



stations in national telecommunications policy, the Commission itself proposed a translator “preference” for noncommercial entities, stating “we believe that non-profit operations have had an important role in the development of the translator service, including pioneering efforts in origination, in Alaska and elsewhere. We want to assure strong noncommercial participation in the low power television service, cooperatively with public broadcast interests.”<sup>34</sup>

Moreover, when discussing early cable carriage requirements in 1972, the Commission stated: “As to noncommercial educational translators, however, the need for carriage of translators of power of less than 100 watts has become apparent because such translators often represent the only means of bringing educational programs to remote communities and schools” and further ruled that “a noncommercial educational translator is defined as one that carries the programming of a noncommercial educational television stations, irrespective of the identity of the licensee of the translator.”<sup>35</sup>

**C. The Commission Should Give Full Effect to the NPR Decision by Creating a Special Translator Category for Noncommercial TV Translators**

The Commission has stated that while it is not inclined to establish NCE eligibility criteria specifically for TV translator channels, it has sought comment on whether it should do so “in order to give full effect to the NPR decision.”<sup>36</sup> The Commission seems to be concerned that it has not, in the past, applied NCE eligibility criteria to TV translators and “licensed” translators as noncommercial. APTS believes this concern is easily resolved. By definition, translators do not originate programming.<sup>37</sup> The translator derives its noncommercial

---

<sup>34</sup> An Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, Notice of Proposed Rulemaking, 82 FCC 2d 47 (1980).

<sup>35</sup> 25 RR 2d 1501, 36 FCC 2d 326, (June 26, 1972)

<sup>36</sup> Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, NPRM, ¶ 21.

<sup>37</sup> See 47 C.F.R. § 74.731(e).

status from the station that it rebroadcasts. Thus, a noncommercial educational TV translator (an “NCE TV translator”) is one that rebroadcasts a noncommercial educational television station, which is, of course subject to the Commission’s eligibility criteria. No further eligibility criteria are necessary; the Commission can simply adopt a self-implementing rule defining “NCE TV translator station.” These NCE TV translator stations would qualify under Section 397(6) and 309(j)(C)(2) of the Act, and would be exempt from auctions.

Moreover, the nature of an NCE TV translator is easily discernible and could be readily tracked by the FCC.<sup>38</sup> The FCC licenses for TV translators identify by call sign the primary station that the translator is rebroadcasting; if the primary station is licensed as noncommercial and qualifies under Section 397(g) and 309(j)(C)(2)), then the NCE translator also “qualifies.” All existing NCE TV translators could be given an opportunity to “opt in” to NCE TV translator status. This would not require any eligibility showing, simply a certification under oath pursuant to Section 1.16 that the TV translator station currently broadcasts (and would continue to broadcast) an eligible noncommercial educational television station. Going forward, applicants seeking NCE translators would be required to make this certification as part of the application process.<sup>39</sup>

#### **D. NCE TV Translators Should Qualify for Limited Priority Processing.**

The Commission asked for comments addressing what changes, if any, the Commission should make to its procedures to ensure that entities that wish to operate new noncommercial TV translators have opportunities to obtain those licenses. After careful analysis of public television

---

<sup>38</sup> In fact, the FCC already tracks this information. As part of the TV translator application process, the FCC collects information on NCE TV translators that claim exemption from application filing fees because the translator operates (or will operate) on a noncommercial educational basis. See FCC Form 346, Instructions for Section I, A. Fees. (June 2000 edition date) and 47 C.F.R. Sections 1.1112(d) and (e)(2002).

<sup>39</sup> Moreover, this certification would deter speculators and other unqualified applicants, as translators must obtain the permission of a primary station to rebroadcast its signal. See 47 C.F.R. Section 74.784 (2002).

use of TV translator stations and the need for public television service, APTS proposes that this issue may be resolved, in large measure, by according existing TV translator stations (including NCE TV translator stations) limited first-come, first-served priority processing to accommodate displacement relief and the need for fill-in service.

APTS's concern is motivated by preservation -- the need to continue to provide public television service to the 99% of the American public that currently has access to it, during and after digital television transition. Therefore, APTS proposes that any application proposing a TV translator station necessary to preserve existing television service to the public should be entitled to priority processing (on a first-come, first-served basis) over "new entrant" LPTV or translator applications. This type of rolling first-come, first-served processing would ensure that the public is not deprived of existing television service as a result of spectrum congestion during the conversion from analog to digital. APTS recognizes that the Commission has made some provision for priority processing for TV translator stations subject to displacement because of the DTV transition or the reallocation of Channel 52-69. However, such first-come, first-serve processing needs to be extended to cover additional circumstances during the DTV transition that would otherwise result in loss of an existing television (including public television) signal. These include translator applications (a) to provide fill-in TV service due to a gap in analog or digital television coverage; (b) to provide fill-in NCE TV coverage due to increased interference during the DTV transition; and (c) to provide dual analog/digital NCE translator services, in the event that the FCC decides to allow that method to convert TV translator stations to digital.

As noted above, the Commission already processes TV translator displacement applications in this way for this same reason -- to continue the provision of existing service. For instance, where a translator is displaced, current Commission policy allows it to apply on a first-

come, first-served basis for a suitable replacement channel in the same geographic area without being subject to competing applications and without having to wait for a filing window.<sup>40</sup> The Commission has also relaxed certain technical requirements pertaining to interference standards and taboo restrictions to assist displaced translators in finding new spectrum.<sup>41</sup>

If the Commission were to expand the opportunities to gain priority and permit additional first-come first-served filings for TV translator applicants, including those applicants addressing the need for continued public television service, APTS believes that its concerns about preserving existing public television service (including the service provided by its members' estimated 700 NCE TV translators) would be significantly ameliorated.

**E. Mutual Exclusivities Between “Mixed” Groups of NCE TV Translators and other LPTV/TV Translator Station Should be Resolved by A Need-Based Approach**

The Commission notes that, if Congress has exempted NCE translator applications from auction, it must determine the mechanism for resolving “mixed” groups of mutually exclusive applications. This issue addresses APTS’s second grave concern about future access to TV translator licenses in order to provide NCE service to areas that are unserved or underserved by public television. APTS realizes that the vast majority of the American public enjoys some access to public television service; however, population growth in metropolitan and rural areas is unpredictable and public television needs the flexibility to obtain NCE TV translator licenses to serve unserved or underserved areas in the future.

Therefore, APTS proposes that the Commission use a need-based approach similar to the one set forth in amended Section 73.202(a)(1) of the Commission’s Rules, as established in

---

<sup>40</sup> See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report & Order, 12 FCC Rcd 14588, 7 CR 994, FCC 97-115, MM Docket No. 87-268, ¶ 144 (April 21, 1997).

<sup>41</sup> Id. at ¶145.

Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Report & Order, FCC 00-120, 15 FCC Rcd 7386, ¶ 114 (rel. April 21, 2000). The need for an NCE TV translator station would be greater than the need for any other LPTV or TV translator station if it were demonstrated that:

the NCE TV translator applicant would provide a first or second television NCE service to 10% of the population within the proposed NCE translator station's protected contour.<sup>42</sup>

If an NCE TV translator applicant could not make this showing, the Commission would not award the channel to that applicant.<sup>43</sup>

APTS submits that this need-based showing could be incorporated into FCC processing in one of two ways: (1) after mixed groups of mutually exclusive TV translators are announced and during the time period allowed for technical settlements; or (2) as part of a channel reservation system for NCE TV translators. APTS believes that the number of future NCE TV translators able to meet this need-based showing will be extremely few in number, given the incumbent users of the spectrum and widespread existing public TV service, but that the use of NCE TV translators to provide public TV service to those last pockets of unserved and underserved areas is extremely critical. Given that some mechanism is required to resolve mixed groups, APTS submits that the need-based showing is good public policy, as it would encourage the provision of NCE TV translator service to the last of the unserved and underserved areas consistent with the congressional mandate in Section 396 of the Act. Moreover, because the need-based showing would require some engineering expense, speculators or other applicants

---

<sup>42</sup> The protected, predicted contour of the translator station is defined in 74.707 of the FCC Rules.

<sup>43</sup> APTS is aware that the current approach in 73.202(a)(1) discounts population differences of fewer than 2,000 persons. Because translators are intended to serve sparsely populated rural areas, NCE service to less than 2,000 persons is significant.

with questionable bona fides would be discouraged from seeking NCE TV translators merely to avoid competitive bidding.

No doubt, such mutual exclusivities will be rare. In fact, based on the last LPTV/TV Translator filing window for Auction 81, only around 35 mutually exclusive groups included NCE translators of APTS member stations out of a total of approximately 592 mutually exclusive groups (i.e., fewer than 6% of the mutually exclusive groups). All but a handful of those APTS member mutual exclusivities have been resolved by technical or other settlements.

**F. Mutual Exclusivities Between NCE Applicants for TV Translator Service Should Be Resolved Through the Commission’s Established Point System**

The Commission has also asked for comments on how to resolve “mutually exclusive LPTV and TV translator groups that contain applications filed by only NCE entities.”<sup>44</sup> In particular, the Commission asks whether such mutual exclusivities should be resolved through the point system that already applies to full-power NCE/NCE MX groups.<sup>45</sup> Given APTS’ proposal above for first come/first serve priority processing for NCE translators preserving existing NCE service, APTS supports resolving NCE TV translator mutual exclusivities through the point system already established by the Commission for full-power NCE/NCE mutual exclusivities. Because NCE TV translators simply rebroadcast the signal of a full-power NCE station, there should be no difference between the process the Commission uses to resolve full-power NCE/NCE MX groups and the process it uses to resolve translator NCE/NCE MX groups.

---

<sup>44</sup> NPRM, ¶ 21.

<sup>45</sup> See NPRM, ¶ 21 and See 47 C.F.R. §§ 73.7000 et. seq.

## CONCLUSION

As shown above, based on the statutes at issue, congressional intent, established FCC policies and the public interest, APTS submits that NCE TV stations (and the translators that rebroadcast them) are not subject to competitive bidding. All NCE entities that meet the TV eligibility requirements fall within the scope of the legislative exemption in Section 309(j)(2)(C). To bar or restrict NCE entities from applying for unreserved channels would contravene congressional intent, as expressed in Section 396 of the Act, and decades of Commission policy.

The FCC's criteria providing NCE entities with additional flexibility in reserving channels is an adequate solution to ensure NCE access to full-power TV stations going forward. However, noncommercial TV translator applicants (which are a key component of the nationwide public broadcasting coverage mandated by Section 396 of the Act) will not have adequate access to unreserved spectrum (and have no reserved spectrum to fall back on) if the Commission persists in subjecting all TV translators to auctions. Reading Section 397(6) in conjunction with Sections 309(j)(2)(C) and 615(l)(1) of the Act, it is clear that Congress intended to exempt noncommercial TV translator stations from auctions. As the FCC's own statements make clear, the Commission always intended for noncommercial TV translator applicants to have appropriate access to spectrum. Thus, the Commission should (i) create a self-implementing special translator category for "NCE TV translators," based on the status of the primary station, (ii) accord limited priority processing to TV translators seeking to preserve existing television service (including NCE TV translators); and (iii) adopt a "need-based" approach to resolve "mixed" groups of mutually exclusive NCE TV translators and other LPTV/TV translators. Mutual exclusivities between purely NCE TV translator applicants should be resolved by the established point system.

Respectfully submitted,

/s/ Marilyn Mohrman-Gillis

Marilyn Mohrman-Gillis

Vice President, Policy and Legal Affairs

Lonna M. Thompson

Associate Vice President, Strategic Initiatives  
and Corporate Counsel

Andrew D. Cotlar

Staff Attorney

Association of Public Television Stations

666 Eleventh Street, NW, Suite 1100

Washington, D.C. 20001

[www.pts.org](http://www.pts.org)

Telephone: 202-654-4200

FAX: 202-654-4236

May 15, 2002